No. 44635-9-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

EAGLE SYSTEMS, INC., a Washington corporation;
GORDON TRUCKING, INC., a Washington corporation;
HANEY TRUCK LINE, INC., a Washington corporation;
JASPER TRUCKING, INC., a Washington corporation;
KNIGHT TRANSPORTATION, INC., an Arizona corporation;
PSFL LEASING, INC., a Washington corporation; and
SYSTEM-TWT TRANSPORTATION,
a Washington limited liability company,

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON EMPLOYMENT
SECURITY DEPARTMENT,

Appellant/Cross-Respondent.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Federal Cases

Other Cases

Statutes

Codes, Rules and Regulations

Other Authorities

A. INTRODUCTION

The respondents ("the Carriers")[1] were statutorily prohibited from seeking declaratory relief in court on the legal issues involved in this case, issues which are vital to them and the trucking industry generally. As a result, the case languished in the administrative process for nearly three years due to incompetence of the auditors of the Employment Security Department ("ESD") and delays engendered by its counsel. The amount of additional unemployment compensation taxes the Carriers allegedly owed was finally resolved by agreement when the Carriers accepted the terms of *an offer ESD made.* This afforded the Carriers the opportunity to finally have their day in court on the legal issues pertaining to owner/operators that fundamentally affect the trucking industry.

The trial court here carefully determined that ESD made the offer to resolve issues relating to the assessment amounts and that the Carriers accepted the offer. ESD then reneged on its offer, insisting that the Carriers had no right to pursue judicial review. Nevertheless, the trial court enforced the agreement.

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[1] The Carriers are interstate trucking carriers who lease trucking equipment from independent owner/operators. "Owner/operator" is the term traditionally used in the trucking industry to refer to individuals who own and lease their expensive trucking equipment -- typically the truck tractor and sometimes the trailer -- to trucking companies or carriers (like the Carriers in this case) for payment. The Carriers will use the phrase throughout this brief.

Now, to compound a pattern of delay that has characterized ESD's conduct throughout this case, ESD has appealed the trial court's ruling. It does so even though it is ultimately not harmed by that ruling and its own staff admits that ESD would benefit from a clarification of the law. ESD's procedural arguments and those relating to whether a settlement occurred are baseless.

This Court should not only affirm the trial court's ruling on the existence of an agreement, but also impose sanctions against ESD for its conduct at trial and on appeal calculated to protract the resolution of the issues in this case.

B. ASSIGNMENTS OF ERROR

ESD has not assigned error to *any* of the trial court's findings of fact. It merely assigned error to the findings and conclusions in general. ESD's failure to assign error to the findings of fact renders them verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004), *review denied,* 164 Wn.2d 1011 (2008).

The Carriers acknowledge ESD's assignments of error, but believe the issues pertaining to those assignments are more appropriately formulated as follows:[2]

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[2] It is important to note the precise issues raised by ESD in its opening brief. In its various motions seeking a stay or accelerated disposition by this Court, it has asserted that the trial court improperly ordered the entry of a consent order by the ALJ from which

1. Did the trial court correctly conclude that a show cause procedure, found by Washington courts to provide an expeditious process for resolving certain issues and to comport with due process principles, was appropriate to address whether a resolution of the issue of the amount of ESD assessments had occurred where the administrative hearing was looming and any other procedure would have compelled the hearing to occur?

2. Where ESD proposed the material terms of an agreement on the amount of the assessments owed by the Carriers and the Carriers accepted those material terms, was the trial court correct in concluding that the parties' settlement of that issue was enforceable?

On cross-review, the Carriers assign error to the trial court's denial of their request that the court impose sanctions against ESD for its bad faith conduct. The issues pertaining to that assignment are as follows:

1. Did the trial court err in refusing to find ESD engaged in bad faith conduct and to impose sanctions against it where ESD's contentions regarding a settlement proposal it made and then reneged upon were advanced for illicit purposes as part of its continuing tactic of foot-dragging and delay in the administrative disposition of the assessments against the Carriers? (Assignment of Error on Cross-Review Number 1).

2. Is ESD's appeal frivolous and/or taken for purposes of delay?

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the Carriers have appealed, claiming that the trial court had no authority to do so. Thus, any appeal to superior court under the APA was defective and the superior court lacks jurisdiction to address the appeal. Mot. to Mod. at 13-14; Mot. for Accelerated Rev. at 3; Reply on Mot. for Accelerated Rev. at 4; Reply on Mot. to Stay at 9. ESD acknowledged the entry of the consent order. Br. of Appellants at 10 n.3. *ESD has not raised any issue in its opening brief on the consent order, thereby waiving it.*

In any event, ESD's position is frivolous. The trial court determined properly under RCW 34.05.534(3) that the Carriers had no further need to exhaust administrative remedies before it could proceed to superior court on the legal issues in the case. RP (3/1/13):24, 30.

C. STATEMENT OF THE CASE[3]

ESD tries to expand the number and nature of the issues before this Court by arguing in its replies in support of its motions to modify and for accelerated review that there is no final agency order by ESD's Commissioner from which the Carriers can seek judicial review; consequently, the Carriers' judicial review action in the Spokane County Superior Court is invalid. Reply in Support of Acc. Rev. at 4; Reply in Support of Mot. to Mod. at 9-10. The Court should disregard this new argument. ESD *waived* the issue below in any event:

> MR. TALMADGE: Our No. 5 basically says, "Any further administrative proceedings would frustrate the purposes of the agreement entered into by ESD and the Carriers." The intent was to get past the administrative process, and I think that was a critical conclusion of the Court. It segueways into the 1 second paragraph that "The Carriers shall present to the Chief Administrative Law Judge an order within five days." The State's position is that the State wants to have the order presented to the Administrative Law Judge so there can be a petition for review to the Commissioner.
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> MS. KANAZAWA: No, no. We really didn't mean to do that.
>
> THE COURT: Then let's put that in the order. I am assuming that this submission to the ALJ is an administerial requirement to conclude the proceedings at the administrative level, but based on Counsel's representation, they don't intend to take any kind of an appeal to the Commissioner, a Petition for Review; is that correct?
>
> MS. KANAZAWA: That's correct. We do not mean to change that. I think that was already covered.
>
> . . . .
>
> MS. KANAZAWA: The final portion which we incorporated in our version says, "The Employment Security Department," page number 1, "acting through its Commissioner." We did not object to that, and we incorporated that in our proposed order so we didn't mean to do any trick or anything to change the ruling made by this Court. *I believe that the submission of the order to ALJ Gay by the Chief Judge of the OAH doesn't make any difference in terms of the exhaustion remedies. We struck the exhaustion portion because we found that to be unnecessary.*

RP (3/1/13):23-24, 26 (emphasis added).

[3] ESD's statement of the case in its brief fails to comply with RAP 10.3(a)(5) as it intentionally omits key facts and contains argumentative assertions. For example,

Owner/operators have traditionally been an important part of the trucking industry, and are used in most, if not all, sectors of the industry, including long-haul trucking, household goods moving, and intermodal operations. CP 54.[4] Owner/operators are essential to the trucking industry, and have been so for decades, because cargo demands are cyclical and trucking firms cannot afford to have expensive equipment and drivers stand idle when not needed. *Id.* As a result, the contemporary American trucking industry is structured around independent owner/operators who lease their trucking equipment to motor carriers like the Carriers involved in this case.[5] *Id.*

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nowhere does ESD reveal when it conducted the audits at issue here or when it issued orders and notices of assessment.

[4] This Court has explicitly recognized that trucking carriers are not required to pay worker compensation premiums and unemployment compensation taxes on owner/operators. *See* RCW 51.08.180 (owner/operators exempt from Industrial Insurance Act coverage); *Wash. State Dep't of Labor & Indus. v. Mitchell Bros. Trucking, Inc.*, 113 Wn. App. 700, 54 P.3d 711 (2002) (This Court determines that trucking carrier was exempt from worker compensation premiums for owner/operators.). *See also, Dosangh v. Bhatti,* 85 Wn. App. 769, 934 P.2d 1210, *review denied,* 133 Wn.2d 1016 (1997) (action against owner/operator possible as such person was not covered under Industrial Insurance Act). In *Penick v. Employment Security Dep't*, 82 Wn. App. 30, 917 P.2d 136, *review denied,* 130 Wn.2d 1004 (1996), this Court affirmed a trial court ruling that a trucking company was not obliged to pay unemployment compensation taxes on owner/operators. This Court carefully distinguished between the company's contract drivers for whom taxes were owed, and owner/operators for whom taxes were not owed. Of particular importance was the owner/operators' ownership of the trucks and the fact they paid for truck repairs and maintenance, insurance, license fees, trip expenses, and fuel costs, unlike the contract drivers. *Id.* at 35.

[5] Estimates of the number of owner/operators vary. The Owner-Operator Independent Drivers Association ("OOIDA") – the international trade association representing independent owner-operators and professional drivers – boasts more than 160,000 members in the U.S. and Canada. As of 2002, the federal government estimated

The Carriers are common contract or for-hire general freight carriers. CP 27. They operate in a number of states under the authority granted by the Federal Motor Carrier Safety Administration. They typically own their own trucking equipment and hire company drivers to operate it, but they also contract with owner/operators to lease trucking equipment from the owner/operators to haul freight when needed to meet fluctuating demands for trucking services. *Id.*

Federal law specifically recognizes owner/operators. Federal regulations dictate the actual contractual terms between trucking companies and owner/operators in what are described as Truth-in-Leasing regulations. 49 C.F.R. Part 376. CP 54. Those regulations impose requirements on the Carriers when using owner/operators. *See, e.g.,* 49 C.F.R. § 376.12(c)(1) (requiring a carrier to maintain "exclusive possession, control, and use of the equipment for the duration of the lease."). But nothing in the federal regulations is intended to affect whether the owner/operator is an independent contractor or an employee. 49 C.F.R. § 376.12(c)(4).

In this case, ESD targeted the interstate trucking industry as part of a politically-motivated initiative to enhance revenues and to collect taxes

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that there were 390,000 owner-operators. There might be as many as 500,000 owner-operators in the U.S. According to the Department of Labor, approximately eight percent of all truck drivers were self-employed owner/operators in 2008. CP 26.

from what it has described as the "underground economy." CP 44, 55. As part of that initiative, it audited the Carriers and determined in 2010[6] that the owner/operators with whom they contracted were their employees for purposes of assessing unemployment compensation taxes. *Id.* ESD's real intent is to eliminate the use of owner/operators as part of its "underground economy" efforts. CP 55-56.[7]

Without statutory authority or the adoption of a rule, ESD established an underground economy unit to conduct strategically targeted audits of certain industries. CP 202. At the urging of auditor Joy Stewart, who had minimal training and no educational background in auditing, ESD targeted the Carriers for audits. *Id.* Stewart conducted most of the Carriers' audits. *Id.*

In these "audits," ESD employed auditing standards not applied to all other Washington employers. *Id.* The audits were conducted in violation of ESD's established policies and procedures including Generally Accepted Auditing Standards and the requirements of ESD's own Tax Audit Manual. *Id.* Former State Auditor Brian Sonntag was

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[6] The notices of assessment for the Carriers were issued between May 4, 2010 and December 27, 2010.

[7] The Carriers herein are not "underground" in any sense. They are established Washington businesses maintaining accounts with the State to pay unemployment taxes and worker compensation premiums for their employees and taxes to the Department of Revenue. Moreover, they conduct their businesses openly on Washington's public streets and highways and are regulated by state and federal law in such activities. CP 52-54.

prepared to testify that ESD's actions were not consistent with good standards for government auditors. CP 25; RP (2/15/13):15-16.

The audit outcomes were effectively predetermined. As part of Stewart's job performance criteria as an underground economy auditor, ESD directed that she find employers in violation of Washington unemployment compensation law 98-100% of the time and that she bring in a set amount of additional premiums each month. CP 202. Stewart even wrote the Governor asking that she be paid a percentage of all taxes she assessed and paid to the State. *Id.*

As a result of this quota system, the audits were effectively a sham with predetermined results. *Id.* For example, Stewart admitted that she did not even consider the owner/operators' equipment ownership[8] or any other criteria required to be considered by ESD's Tax Audit Manual in performing the audits. *Id.*

In conducting these audits, Stewart also ignored federal law by determining that the only way owner/operators could not be the carrier's employees was if they operated under their own federal operating authority. CP 203. If this were correct, an owner/operator who must

[8] The purchase of a tractor, or a semi as it is often called, can cost $100,000-$150,000. A trailer can be even more expensive. These are not mere hand tool.

operate under a carrier's federal operating authority by federal regulation, 49 C.F.R. § 376.12, would *always* be an employee of a trucking carrier.[9]

After these audits began, their inadequacies and the role of the federal regulations were brought to the attention of the Governor's Office. CP 203. ESD was informed of such concerns. *Id.* ESD Commissioner Paul Trause specifically became involved in the System-TWT Transportation's assessment that resulted from Stewart's audit and ordered the Department to attempt to enforce it, even though ESD's Director of Tax Compliance could not discern the basis for the audit's conclusions. *Id.* ESD's efforts against the Carriers went forward anyway.

Predictably, ESD issued assessments following Stewart's audits imposing additional unemployment compensation taxes against each Carrier in 2010.[10] The total of all such assessments was nearly $460,000.

The Carriers appealed ESD's assessments, and the cases were assigned to an administrative law judge ("ALJ") of the Office of

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[9] ESD's objective to eliminate the use of owner/operators in the trucking industry affects routes, prices, and services of trucking firms and is preempted under federal law. 49 U.S.C. § 14501(c); *ATA v. City of Los Angeles*, 559 F.3d 1046, 1056 (9th Cir. 2009): *ATA v. City of Los Angeles,* 596 F.3d 602, 604 n.4 (9th Cir. 2010) (effort by ports to phase out owner/operators in guise of environmental and safety concerns preempted by FAAAA). *See also, ATA v. City of Los Angeles*, ___ U.S. ___, 2013 WL 2631059 (2013) (contractual requirements of placards on trucks and a plan for off-street parking preempted).

[10] The Carriers were traditional long-haul trucking companies. Although ESD continues to refer to Hawkings as a "carrier," br. of appellant at 2, 6, Hawkings is not a

Administrative Hearings, Todd Gay. The Carriers then filed a consolidated summary judgment motion raising a number of legal questions, including whether owner/operators provided personal services within the meaning of RCW 50.04.100, whether owner/operators met the test in RCW 50.04.140 for exempt independent contractors, whether ESD's efforts were preempted by federal law, and whether the assessments had to be dismissed because the audits so far departed from the requirements of law and audit practices in their conduct. CP 43-44.[11] ALJ Gay denied that motion on March 22, 2011. CP 171-83.

However, recognizing fundamental flaws in ESD's audits,[12] the ALJ remanded the assessments to ESD on April 5, 2011 for "further deliberation, reconsideration and new written audit findings" because, even if the Carriers were liable for additional unemployment

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trucking company at all, but operated pilot cars for heavy loads delivered by trucking companies. CP 82, 238.

[11] After ESD's tax assessments were issued, the Carriers raised the issue of rigged audits with predetermined results violating Department standards and auditor objectivity. CP 181. ALJ Gay ruled that he had no power to address such audit deficiencies. *Id.* Any appeal from the ALJ's inability to address these violations was to Commissioner Trause, who had had personal involvement in these cases. RCW 50.32.080.

[12] ESD has disputed that ALJ Gay found fundamental flaws in ESD's audits in various pleadings submitted to this Court. But it can offer *no other explanation* for the remand or the extensive requirements the ALJ imposed upon ESD on remand. In effect, ALJ Gay commanded ESD to make new assessments against the Carriers. Further evidencing the poor quality of the initial assessments based on Stewart's audits, the ultimate assessments were *reduced by over 70%.*

compensation taxes, the amounts that ESD imposed were clearly wrong. CP 58-61. In particular, ALJ Gay ordered ESD to address how much of the ESD assessments pertained to the rented trucking equipment, CP 60, and to "review, reconsider and re-write its audit findings in compliance with [the remand] order, to include a new list of individuals who it determines should be classified as employees" and to "identify the entities which are incorporated." CP 58. The ALJ also ordered ESD to determine if any of the identified owner/operators lacked a relation to Washington for situs purposes under RCW 50.04.110. CP 59-60.[13] ALJ Gay concluded that if an owner/operator lived out-of-state and did not drive in Washington, then the owner/operator was not an employee. CP 59. He also ordered ESD to fairly apportion payment under the contract between the value of the trucking equipment and the value of the driving or other personal services provided. CP 60. He then directed ESD to issue amended audit findings and assessments, consistent with the terms of the remand order. *Id.*[14]

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[13] System, located in Spokane, in particular, contracts with a number of owner/operators who live out-of-state, are dispatched from outside of Washington, and drive no miles or a de minimus number of miles within Washington. CP 325-31.

[14] ESD makes reference in its factual recitation to a federal action filed in July 2011 by some of the Carriers. Br. of Appellant at 4. This is part of ESD's effort at misdirection. ESD wants to blame its *three-year delay* in the administrative process on the filing of this action. ESD's administrative delays -- flawed audits, long delays in issuing new assessments, and delays before the ALJ -- have *exactly nothing* to do with that litigation. That litigation did not involve any discovery and was resolved on motion.

ESD issued "re-determined" assessments for all of the Carriers approximately *one year later*, on April 16, 2012. CP 64-65.[15] But it did not provide any supporting documentation for the amount of the assessments and their calculations and did not make the situs adjustment for System the ALJ required in his remand order. CP 44.[16] The Carriers' counsel notified ESD that there were errors in the revised assessments and spent the next few months working with former ESD counsel, AAG Marc Worthy, to resolve them. CP 44-45. During the course of these discussions, the parties agreed to exclude any owner/operators with valid UBI numbers and/or corporate form. CP 45. ESD made additional adjustments to the revised assessments on *several* occasions thereafter based on the parties' agreement, including a revision in July 2012. CP 67-68.

On August 1, 2012, the Carriers specifically asked ESD for information to support its July 2012 revisions. CP 45, 70-73. AAG

ESD also implies that the federal court resolved the Carriers' issues raised in the lawsuit on the merits. It did not. The federal court effectively dismissed the action *without prejudice*, on the basis of the Tax Injunction Act, 28 U.S.C. § 1321, which requires exhaustion of state court remedies where an issue pertaining to a state tax, like the unemployment compensation taxes here, is raised.

[15] ESD later asserted through its counsel in January 2013 that these re-determined assessments were not official. CP 127, 130.

[16] Even so, the total of the Carriers' assessments was reduced by ESD to approximately $131,000 representing a nearly 70% reduction over the original assessments, CP 77, documenting just how flawed the original assessments were.

Worthy stated that the *only* documents available to support ESD's revised calculations were the original audit narrative and two sets of massive spreadsheets that it created for each Carrier, which AAG Worthy then provided. CP 70. The Carriers later discovered that the baselines ESD was using to calculate the various adjustments were wrong. CP 45.

System subsequently advised ESD that the spreadsheets supposedly supporting its July 2012 adjustment were identical to the ones previously provided and that it still needed a key or formula to make sense of them. CP 45. System again requested information to be able to link the unidentified entries on ESD's spreadsheets with the individual owner/operators that ESD reclassified as employees. *Id.*

On September 7, 2012, ESD reduced System's assessment without explanation to $83,955.75. CP 45, 75. It sent another set of spreadsheets to support the revision. *Id.* The September revision was the first time that ESD performed the situs adjustment ordered by the ALJ in April 2011. *Id.*

The Carriers filed a motion to compel production of ESD's supporting documentation for the amount of each Carrier's now amended assessment on September 14, 2012 to confirm ESD's calculations and to prepare for hearing. CP 45-46. ALJ Gay delayed consideration of the motion to allow the parties to focus their efforts on a potential resolution of the issues remaining in the administrative process. CP 46.

On September 26, 2012,[17] ESD authorized AAG Worthy to make an offer to the Carriers to resolve the issues in the administrative process. CP 46, 78-79. Worthy relayed ESD's offer to resolve the appeals by email, stating:

> *I have been authorized by my client to make the following offer*. My client is willing to drop penalties and interest [sic] all 8 cases in return for payment of the back taxes (as seen in the far right column) and your clients' stipulation to liability. In other words, the assessments are affirmed and your clients drop their appeals at OAH. Neither side pays any attorney fees. *Your clients are then free to pursue whatever legal issues they want in superior court.*
>
> Please note that my client is most interest[ed] in having all of your clients settle at the OAH level. Please let me know what your clients' view of this offer is. Thanks.

CP 78-79 (emphasis added).[18]

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[17] AAG Worthy subsequently corrected his initial email offer to reflect the correct amount of the agreed assessments. CP 46-47, 77.

[18] Thus, ESD, not the Carriers, *established the material terms of the proposed settlement* in this email, which were:

- ESD waives penalties and interest;
- The Carriers stipulate to liability for the taxes due;
- ESD and the respective carrier agree that the final assessment amount is that proposed by ESD in its September 26, 2012 email;
- The Carriers agree to pay their respective final assessments;
- ESD and the Carriers agree to bear their own attorney fees and costs in the administrative process; and
- The Carriers retain their right to appeal the legal issues.

On October 8, 2012, Tom Fitzpatrick, the Carriers' counsel, accepted ESD's offer in writing and agreed with all of the material terms stated in Worthy's September 26 email, CP 47, 81-83, stating the terms as follows:

> 1. ESD will drop any claim to penalties and interest.
>
> 2. The respective carrier and ESD will stipulate that the final amount of the assessment is [sic] amount listed above. The respective carrier will pay that amount to ESD as the final assessment amount. The payment will not prejudice the carrier's ability to appeal the law of the case. Payment may be made under protest. This resolution establishes the amount of the assessment, if any, owed by a carrier. If the case is reversed after any appeal set forth in ¶ 4, ESD will refund the amount paid plus interest.
>
> 3. The carriers will stipulate that under the law of the case as established in the rulings of Judge Gay acting as the ALJ in this matter, with which the carriers disagree, there would be a finding that the persons or entities for which there is an assessment are employees of the respective carriers for purposes of RCW Title 50.
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> 4. Under the resolution, the carriers retain their full rights to appeal and pursue their legal remedies in the courts. ESD will not challenge the right of any carrier to appeal and will not appeal this final resolution of the administrative process.[19]

It is particularly noteworthy that ESD specifically proposed the Carriers could raise "whatever legal issues they want in superior court." *Nowhere* did ESD condition its offer on the execution of a final written settlement agreement. CP 78-79.

[19] On this key point, ESD and the Carriers plainly agreed that the Carriers could pursue whatever legal issues they wanted in the APA judicial review proceedings. ESD's attempts in its brief at 7 to imply that the legal issues that could be addressed in any APA judicial review proceeding were to be more limited only demonstrates how ESD attempted to back away from the terms of *its own offer*.

> 5. Neither ESD nor any carrier will seek attorney fees and costs in the current administrative process.
>
> 6. The parties will craft a final order based upon the above for entry by Judge Gay and the OAH administrative process will be complete except for the appeal to the Commissioner which must be undertaken to preserve our right to seek judicial review. The Commissioner will not change or alter the resolution of these matters as outlined above.

CP 81-83.[20] The Carriers provided additional consideration for the agreement by not pursuing their pending motions to compel and to strike penalties and interest. CP 47.

Further discussions then ensued on the form of the formal written settlement agreement.[21] Throughout those discussions, ESD was fully aware that the critical term in the agreement was the Carriers' ability to appeal the "law of the case" established by the legal rulings contained in ALJ Gay's March 22, 2011 summary judgment order. CP 48. Although

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[20] ESD observes in its brief at 6 that the Fitzpatrick letter proposed a different approach for Hawkings, but describes Hawkings as a "carrier." As noted *supra*, Hawkings was *not* a trucking carrier. It was a pilot car company. It did not share the issues of the other Carriers. But ESD then demonstrates why a response that did not include Hawkings was of no moment whatsoever to the offer and acceptance that occurred. Hawkings and ESD settled. Br. of Appellant at 7 n.2.

[21] In its description of these discussions in its brief at 8-9, ESD confuses agreement on a settlement with agreement on the specific language of any formal written settlement agreement. *None* of the provisions from the formal settlement agreement cited by ESD in its brief at 8 repudiates the already-existing settlement. The parties agreed on the material settlement terms ESD proposed. ESD never made agreement on the execution of a formal settlement agreement a material term of the settlement, though it clearly had the ability to do so and did not opt to make such a requirement a material term.

Worthy informed Fitzpatrick by email on October 16, 2012, that ESD had issues with the phrasing proposed in their October 8 letter, CP 47, 85, Worthy reiterated that ESD understood the Carriers wanted to preserve their right to appeal and that it agreed they would be free to appeal the legal issues arising from the ALJ's March 22, 2011 summary judgment ruling to the courts. CP 85.

Fitzpatrick provided a draft of the written agreement to ESD on October 19, 2012. CP 47. AAG Worthy responded in writing on October 22, 2012, stating that ESD disagreed with some of the language in the recitals section of the written agreement and that it would be making some changes. CP 47, 88. ESD proposed an alternative form of the agreement on November 2, 2012, nearly two weeks later. CP 47-48, 90-96. Worthy and Fitzpatrick again communicated on November 6. CP 48. Fitzpatrick sent Worthy a draft agreement that once again made clear the Carriers' right of judicial review. CP 100-05.

Worthy emailed Fitzpatrick on November 8, 2012 and expressed ESD's desire to include language that would limit the Carriers' right of judicial review. CP 48, 107. Nevertheless, Fitzpatrick and Worthy worked on final settlement language. CP 48. Worthy sent a redraft on November 15, 2012. *Id.* Fitzpatrick responded and informed Worthy that

the language he proposed was acceptable and they were done. CP 48, 110-11.

On November 16, 2012, ESD pulled an abrupt about-face and refused to include *any* language in the written agreement that preserved the Carriers' right of judicial review as to the legal issues. CP 48, 113.[22] The Carriers advised ESD in writing on November 19, 2012 that its attempt to change the agreement so late in the proceedings constituted bad faith. CP 48-49, 115-16. Worthy was replaced as ESD's counsel.[23]

The Carriers filed a motion to compel enforcement of the parties' resolution on December 17, 2012 when the parties were unable to settle on the language to be used in the formal written agreement. CP 49.

When ALJ Gay learned the cases had not resolved, he set System's assessment for hearing on February 20-21, 2013. CP 220. He did not allow discovery. He also did not require ESD to submit its witness or exhibit lists in the System hearing until February 6, the same date upon which he ordered ESD to provide the information as to how it calculated

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[22] ESD never took this approach in any of the written communications memorializing the parties' agreement; instead, ESD consistently stated that it would not hinder the Carriers' right to appeal the legal issues and that it recognized that preserving this right was one of their paramount concerns. CP 48. The Carriers have fought these assessments so persistently precisely because the issues relating to owner/operators are so central to the trucking industry.

[23] Two and a half years into the case, AAG Worthy was replaced by AAG's Masako Kanazawa, Elizabeth Thompson-Lagerberg, and Leah Harris in December 2012. CP 49, 126-27.

the revised assessment. CP 120-21, 220. He ordered the parties to conduct another settlement effort on January 25, 2013 even though the Carriers' position was that these cases were already resolved. Fitzpatrick Decl. Opposing Mot. to Stay at 10 ("Fitzpatrick decl.").

Bill Ward, the Director of UI Tax Audits and Collections, attended the January 25 meeting. CP 222. During that meeting, Fitzpatrick told him that resolving the federal preemption issue was a legitimate issue that needed to be judicially resolved. *Ward agreed and said everyone would benefit from clarification of that issue*. Fitzpatrick decl. at 10.[24]

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[24] The ALJ also ordered ESD's new counsel to meet in person with the Carriers' counsel in an effort to resolve any outstanding issues related to System's revised assessment and supporting spreadsheets. CP 127. During the meeting, Bill Ward informed the Carriers that the spreadsheets ESD produced for System could not be relied upon to support the revised assessment and were never intended to do so. *Id.* Although provided to the Carriers, ESD claimed the spreadsheets were documents internal to ESD and were created for settlement purposes only. *Id.* Ward confirmed that there was no way to use the figures in the spreadsheets to calculate or to verify System's revised assessment. *Id.* ESD also then reneged on its earlier agreement to exclude owner/operators with a valid UBI number and/or corporate form. *Id.*

ESD's counsel stated on January 11, 2013 that it had not performed an *official* "revised assessment," even though it issued a revised assessment for System on April 16, 2012 that contained errors. CP 127, 130. ESD's counsel insisted that the spreadsheets were created for settlement purposes only and contended that they could not be the basis for a motion to compel. *Id.* In fact, ESD's counsel admitted that System's assessment still contained errors. CP 127-28, 133-36. The Carriers responded and notified ESD that they intended to seek sanctions against the Attorney General's Office and ESD based on ESD's refusal to comply with the April 5, 2011 remand order and its misrepresentations to the Carriers on remand. CP 49.

The ALJ issued an order on January 22, 2013 granting the Carriers' motion to compel and requiring ESD to provide the Carriers extensive, detailed information. CP 119-21, 221.

More critically, the ALJ denied the motion to enforce the agreement resolving the Carriers' administrative appeals, stating that *he was without authority to do so*. CP 121-22.

With the System hearing looming on February 20-21, 2013, the Carriers filed a motion for order to show cause in the Pierce County Superior Court before Presiding Judge Ronald Culpepper on February 1, 2013. CP 1-10, 49-50.[25] The Carriers sought an order directing ESD and its counsel to appear personally and show cause why the Court should not enforce the parties' agreement and compel ESD to execute the formal written agreement fully resolving the administrative appeals. *Id.* Alternatively, they sought an order directing ESD and its counsel to appear personally and show cause why they should not be found in contempt of the ALJ's April 5, 2011 remand order. *Id.* Judge Culpepper granted the motion on February 5, 2013 and entered an order requiring

[25] With the matter pending in court, System necessarily continued to prepare for its looming administrative hearing. It incurred significant legal expense working with its witnesses and interviewing the witnesses that ESD disclosed *for the first time* on February 6, 2013.

ESD to appear on February 15, 2013 and show cause why the Carriers' requested relief should not be granted. CP 11-12, 22-23.

The case was assigned to the Honorable Stanley Rumbaugh for hearing. The trial court conducted a lengthy hearing on the merits on February 15, 2013. The court concluded that the show cause process was the appropriate procedure to resolve the issues here when an administrative hearing was pending and the ALJ had disclaimed any jurisdiction to enforce the terms of the agreement. RP (2/15/13):8-9.

The court patiently examined the record and concluded that the agreement was enforceable. RP (2/15/13):31-53. In specific, the court stated:

> I think that there has been a settlement of the claim. I do not believe that each and every word had to be finally approved by the principals in order for there to be a settlement. There was nothing in the offer that said, "We must agree to the letter on every word that is in the settlement agreement or the deal is off," and there was never any indication at the time of the offer and the subsequent October 8th acceptance that Mr. Worthy did not have the authority of his clients to bind them. In fact, he specifically stated that he did.
>
> I read Morris versus Maks. It is consistent with what the Court understands the law to be in terms of contract formation and in particular settlement contracts. I believe that the CR 2A agreement dispute having been punted by the Administrative Law Judge is appropriately before the Court on the motion to show cause or on the order to show cause.

Id. at 59-60.

The court declined to find ESD in contempt for its failure to comply with the ALJ's order. CP 432. The court entered its order enforcing the agreement on March 6, 2013, CP 427-33,[26] from which ESD appealed. CP 434-507.[27] The Carriers' cross-appealed. CP 508-81. On March 25, 2013, after delay caused by ESD's attempt to include additional terms in the order not contained in Judge Rumbaugh's ruling, ALJ Gay entered the required consent order.

D. SUMMARY OF ARGUMENT

The trial court had both subject matter and personal jurisdiction to enforce the parties' settlement here. The enforcement of a settlement agreement, a proceeding based on contract principles, is within the broad subject matter jurisdiction of Washington courts under our Constitution. Moreover, the trial court here had personal jurisdiction over the parties. The show cause proceeding used in the trial court was an efficient, proper

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[26] The trial court was compelled to conduct an additional lengthy hearing on the form of the order on March 1, 2013 when ESD's counsel raised issues regarding its contents.

[27] ESD also filed a motion in this Court to stay all judicial review proceedings, a motion that would have delayed resolution of the assessments for at least another 15-18 months while review took place in this Court. This is yet again evidence of ESD's delaying tactics. Commissioner Schmidt denied the motion on May 8, 2013. ESD filed a motion to modify that ruling and an additional motion for accelerated disposition, a thinly-disguised effort to obtain a stay.

procedure to address whether a settlement on the assessment amounts was effectuated by the parties, particularly where an administrative hearing was looming and the ALJ specifically disclaimed any authority to enforce the settlement. Any other procedure would have compelled that such a hearing go forward at great, unnecessary expense to the Carriers, wasting resources at the administrative level. An evidentiary hearing was not necessary in the trial court where the court had all the necessary documentary evidence pertaining to the settlement, including declarations of the negotiating counsel. ESD was clearly aware of the Carriers' position.

The trial court correctly ruled that the settlement was enforceable where ESD articulated its material terms in its offer and the Carriers accepted that offer. Subsequent disagreements between the parties about the language of the formal written agreement did not obviate the settlement where the parties agreed on the material settlement terms.

ESD's conduct of foot-dragging and delay on the settlement, part of a larger tactic of delay in the resolution of the assessments against the Carriers, constituted bad faith for which sanctions should have been imposed. ESD's present appeal is similarly frivolous or taken for purposes of delay.

E. ARGUMENT

(1) Standard of Review

ESD contends in its brief at 11-12 that this Court should review the enforceability of the settlement here *de novo*. In so doing, ESD further contends that this Court should disregard all of the trial court's findings of fact as "superfluous" because the proceeding below was, in actuality, a summary judgment proceeding. Br. of Appellant at 12. ESD mischaracterizes the case law.

The cases cited by ESD do not say that enforcement proceedings *are* summary judgment proceedings. Rather, the cases determine that enforcement proceedings are *similar* to summary judgment proceedings to which the *de novo* standard of review adheres. *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696, 994 P.2d 911 (2000); *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001).

While the Carriers agree that the standard of review with respect to the trial court's final determination is *de novo*, the trial court's findings of fact are verities on appeal, supported by substantial evidence, and unobjected to by ESD.

(2) ESD's Procedural Arguments Are Baseless Under Washington Law

ESD contends in its brief at 12-23, 34 that the trial court lacked jurisdiction to enforce the parties' settlement, the trial court erred in employing a show cause procedure, and the trial court should have conducted an evidentiary hearing. It is wrong; these arguments are baseless under Washington law because, under ESD's analysis, after the ALJ disclaimed any authority to enforce the settlement, and given the impending System hearing, *no one* had authority to enforce the settlement in time to avoid the System hearing.

(a) The trial court had subject matter jurisdiction over the enforcement of the settlement

ESD's argument on jurisdiction is imprecise, conflating a number of discrete issues. It is not clear if it is arguing that the trial court here lacked subject matter jurisdiction or personal jurisdiction over the parties. As to either facet of its apparent argument, ESD's position is baseless.

With regard to subject matter jurisdiction, our Supreme Court has been clear that parties have been exceedingly sloppy in asserting that courts lack subject matter jurisdiction. Beginning in *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539-40, 886 P.2d 189 (1994), our Supreme Court clarified that Washington courts enjoy *broad* subject matter jurisdiction under the Washington Constitution. If the *type of controversy* is within the authority of the courts to decide, then the court

has subject matter jurisdiction. *See also, Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003) (improper venue does not deprive courts of subject matter jurisdiction); *ZDI Gaming, Inc. v. State ex rel. Wash. State Gambling Comm'n*, 173 Wn.2d 608, 268 P.3d 929 (2012) (courts had subject matter jurisdiction even where statute prescribed that any matters relating to the Gambling Commission must be addressed in Thurston County; Court reaffirmed that focus for subject matter jurisdiction is the type of controversy).

ESD itself argues that the enforcement of a settlement is predicated on contract principles. Br. of Resp'ts at 23. Contract enforcement actions are well within the constitutional authority of Washington courts. Superior courts are general jurisdiction courts under article IV, § 6 of the Washington Constitution. Actions to enforce contracts generally and settlement agreements, a form of contract, specifically are types of controversies within the courts' power. The trial court here had subject matter jurisdiction.

Alternatively, as the trial court here noted, RP (2/15/13):12-13, the Administrative Procedures Act, RCW 34.05 ("APA") confers express authority on the courts to exercise "ancillary" jurisdiction to administrative proceedings. ESD argues in its brief at 19-21 that the trial court erred in employing this alternative basis for subject matter jurisdiction. If this

Court even reaches this argument, which it need not do in light of the foregoing discussion of subject matter jurisdiction, ESD is wrong.

> RCW 34.05.510(2) states that courts may act on
>
> > Ancillary procedural matters before the reviewing court, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this chapter, by court rule.

In *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.,* 138 Wn.2d 161, 178-80, 979 P.2d 374 (1999), our Supreme Court recognized that courts had ancillary jurisdiction under the APA. The Court expressly noted that court rules could govern such ancillary procedural matters. *Id.* at 178. *See also, Diehl v. Western Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 216, 103 P.3d 193 (2004), *review denied,* 161 Wn.2d 1018 (2007).[28] Contrary to ESD's contention, enforcement of a settlement agreement was ancillary to the administrative proceedings before the ALJ on which the court could act. Here, under the unusual circumstances of this case, there was no other viable option for the Carriers to have the

[28] This is akin to the recognition by our Supreme Court in *Condon v. Condon*, 177 Wn.2d 150, 298 P.3d 86 (2013), that courts retain ancillary jurisdiction to decide to enforce a settlement even where a case has been dismissed with prejudice.

enforceability of the settlement resolved before the February 20-21 hearings in System. RCW 34.05.510(2) provides an alternate basis for concluding the trial court possessed subject matter jurisdiction.

(b) The trial court had personal jurisdiction over the parties in the show cause proceeding

ESD spends much of its brief decrying the trial court's decision to reach the merits of whether a settlement existed between the parties where that limited issue came to court under a show cause procedure. ESD's apparent contention, although this is far from clear in its analysis, is that the trial court did not properly obtain personal jurisdiction over the parties pursuant to such a proceeding. ESD contends that the *only* way a court can obtain personal jurisdiction over a defendant like ESD is for plaintiffs like the Carriers to file a summons and complaint under the civil rules. Br. of Resp'ts at 16-17. ESD is wrong. It elevates form over substance, particularly in light of RCW 2.28.150, where it received notice and had a hearing before an impartial decisionmaker.

A show cause proceeding was an appropriate procedure to enforce the settlement agreement. By statute, the trial court had authority to proceed. In general terms, RCW 2.28.150 confers authority on courts to craft their own means of procedurally addressing issues. In fact, Washington courts have utilized show cause procedures *under the*

authority of RCW 2.28.150 to provide appropriate relief to parties. In *Rogoski v. Hammond*, 9 Wn. App. 500, 504, 513 P.2d 285 (1973), the court upheld use of show cause proceedings in a prejudgment writ of attachment case to uphold the constitutionality of Washington's prejudgment attachment statute:

> RCW 2.28.150 is broad enough to permit a motion or show cause procedure that will enable the court upon notice and hearing to determine whether the claim 'to recover on a contract, express or implied,' is at least probably valid so as to permit the writ of attachment to issue. Nothing in the statute requires that a court take a narrow and grudging view of its application if by doing otherwise RCW 7.12 is saved from due process invalidity.

See also, Wood v. Thurston County, 117 Wn. App. 22, 68 P.3d 1084 (2003) (show cause in public records case).

Washington courts commonly recognize that show cause proceeding offers an expedient method of resolving disputes "without the delay of the regular civil proceeding, while comporting with due process requirements." *State ex rel. Burleigh v. Johnson*, 31 Wn. App. 704, 709, 644 P.2d 732 (1982).[29]

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[29] In *Burleigh*, the court approved of the procedure to enforce child support. CR 60(e) requires a show cause proceeding for post trial relief involving vacation of orders or judgments. RCW 42.56.550 relating to public records requests employs a show cause process. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010). Show cause proceedings are used in prejudgment seizures of property. *See, e.g., Rogoski v. Hammond*, 9 Wn. App. 500, 513 P.2d 285 (1973) (prejudgment attachment). Such proceedings are also used in landlord-tenant disputes. *See, e.g., IBF, LLC v. Heuft*, 141

There is *no authority* in Washington law foreclosing the use of show cause proceedings in a case such as the present one involving a limited auxiliary issue to any judicial review proceeding, where ESD had notice and a hearing before an impartial decisionmaker.[30] In fact, Washington cases that ESD cites in its brief recognize that show cause-type proceedings can be used without the specific filing of a summons and complaint. In *In re Peterson*, 138 Wn.2d 70, 86, 980 P.2d 1204 (1999), the Supreme Court recognized the use of a show cause-type proceeding for the annual reviews under RCW 71.09.090 of whether sex predators should be released. Such a proceeding is an independent legal action, but a new civil action was not necessary before the show cause review could occur.

ESD's repeated contention that show cause proceedings may not be employed without the necessity of *pending* legal action is an elevation of form over substance. The trial court had personal jurisdiction over the

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Wn. App. 624, 174 P.3d 95 (2007); *Carlstrom v. Hanline*, 98 Wn. App. 780, 990 P.2d 986 (2000); *Meadow Park Garden v. Canley*, 54 Wn. App. 371, 773 P.2d 875 (1989).

[30] ESD complains that the initial show cause proceeding was ex parte, br. of appellant at 9, ignoring, of course, that the initial proceeding was essentially to establish the date for the hearing on the merits. The colloquy below is telling:

> MS KANAZAWA: A show cause is backdoor, ex-parte, inappropriate attempt to enforce a disputed settlement.
>
> THE COURT: How is it ex-parte when you are both here?

RP (2/15/13):5.

parties. ESD had notice of the hearing on the limited issue of the enforcement of the agreement[31] and the hearing was held before an impartial decisionmaker. It is for these reasons that show cause proceedings satisfy due process, as the courts in *Rogoski* and *Burleigh* ruled. The content of the order to show cause and the Carriers' memorandum for the show cause hearing were, if anything, more explicit than a "notice pleading" complaint on the enforcement of the settlement would be. ESD received all the process it was due here -- notice and a fair hearing before an impartial decisionmaker.

ESD cites foreign authority[32] and *Condon* for the proposition that the filing of a separate contract action is compulsory before a show cause

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[31] The filing of a summons and complaint is calculated to give a defendant like ESD notice of a plaintiff's claim. As stated in 62B Am.Jur.2d *Process* § 3:

> Generally, the principal purpose of original process is to give to the party to whom it is addressed notice of a proceeding. The purpose of process or summons and service it to provide a party with notice of the action so that such party may respond, be heard, or defend, and thereby safeguard his or her person, property, and rights.
>
> Personal service of process within the jurisdiction is a classic form of notice always adequate in any type of proceeding to satisfy the requirements of due process. Proper process confers jurisdiction and empowers the court to exercise its lawful authority.

Here, the trial court's order to show cause constituted process on ESD.

[32] ESD cites *Commonwealth ex rel. Zimmerman v. Auto Mart, Inc.*, 910 A.2d 171 (Pa. Commw. Ct. 2006), a Pennsylvania trial court decision, *Vermont Div. of St. Bldgs. v. Town of Castleton Bd. of Adjustment*, 415 A.2d 188 (Vt. 1980), and *Voinche v. Lecompte Trade School*, 55 So.2d 889 (La. 1951), for the proposition that a show cause proceeding may not substitute for original process. Br. of Resp'ts at 12-13, 17-18. This

proceeding may be initiated. Br. of Appellant at 12-13. No Washington case has ever held that this is necessary. In the case of the former, *the Carriers tried such a motion to no avail.* They asked the ALJ to enforce the settlement agreement, but he denied the motion, asserting he lacked authority to enforce a settlement agreement. CP 121-22. In other words, the Carriers attempted to resolve this matter in the original action, only to be told that the administrative tribunal lacked authority to grant the relief requested. Thus, the Carriers had *no recourse* in the administrative process. Nor did the Carriers have a right to interlocutory review of the ALJ's decision. ESD cannot point to any Washington authority that afforded the Carriers the right to seek judicial review of an interlocutory administrative decision.

As for the filing of a contract action, *it was not a real remedy* given the impending administrative hearing on February 20-21, 2013; a show cause procedure was the *only* procedure that could provide an expeditious means of deciding if a settlement was in force, obviating a need for the hearing. Had the Carriers followed ESD's course by filing a

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assertion, however, is contradicted by the treatise authority ESD cites. 60 C.J.S. *Motions and Orders* § 22 states: "An order to show cause may constitute process ..." In *Solondz v. Kornmehl*, 721 A.2d 16 (N.J. App. Div. 1998), the court recognized that show cause proceedings may be used as initial process in certain proceedings where authorized by statute or court rule. *See also, Schwartz v. Jacobs*, 352 S.W.2d 389 (Mo. App. 1961) (process may be in the form of an order to show cause); *Ausley v. County of Middlesex*, 931A.2d 610 (N.J. App. Div. 2007).

complaint and filing a dispositive motion, br. of appellant at 16-17, there is *no way* with the time allowed for answers to the complaint, CR 3(a); CR 4(a)(2) (20 days) or the time frame for motions in CR 56(a) and (c) (28 days notice), that the issue of whether the settlement was enforceable could have been resolved before the administrative hearing commenced.[33]

In *Condon*, our Supreme Court got to the merits of whether a settlement existed between the parties. The Court did not permit the procedural quibbling proferred here by ESD to deter it from acting on the merits and rejecting a jurisdictional argument. The Court certainly stated in the ordinary case that a motion to enforce the settlement in that case "is a commonly accepted practice." 177 Wn.2d at 157. However, in *Condon*, the trial court had already dismissed the action. Thus, the Court discussed the ancillary jurisdiction of a court following dismissal to address a settlement, suggesting such jurisdiction was necessary to protect a court's proceedings and to vindicate its authority. *Id.* at 158-59. The Court stated that a motion to enforce in the existing action is preferable to the filing of a new lawsuit. *Id.* at 161. The Court ultimately stated:

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[33] ESD is oblivious to the practical realities of the impending System hearing. ESD argues that a traditional lawsuit should have been filed. Br. of Appellant at 16-17. The Carriers expect that ESD will argue on reply that the Carriers should have filed a traditional action and sought a stay. Given ESD's track record, the Carriers are confident ESD would have taken the full 20 days to answer, would have insisted on 28 days notice for any summary judgment motion, and would have opposed a stay of the System hearing date.

> Here, the trial court acted informally to enforce the settlement. The best practice would have been for the court, at the time of the settlement, to expressly retain jurisdiction for purposes of enforcement or to enter a conditional or delayed dismissal. Since that did not occur, the parties could have moved to vacate the original dismissal under appropriate grounds and then made a motion to reinstate and enforce or commenced a new action for breach of the settlement. Assuming, however, that the process that the trial court followed was adequate, we nevertheless find the court improperly implied additional terms into the agreement, as discussed below.

Id. Of course, none of the specific courses of action the *Condon* court discussed could provide timely relief to the Carriers from the pending System hearing.

ALJ Gay specifically disclaimed any authority to enforce the settlement. Given the utter impracticability of filing a contract lawsuit, waiting the necessary period to file a summary judgment motion, and then giving notice under CR 56, with the February 20, 2013 System hearing looming, the Carriers turned to the show cause proceeding as the most expedient method of resolving this issue that respected ESD's rights to due process. ESD claims the court lacked jurisdiction. In ESD's estimation, *no one* had jurisdiction to compel it to observe the settlement it sought when it reneged on it. The trial court did not err in utilizing a show cause proceeding.

(c) There was no need for an "evidentiary hearing"

Finally, ESD also briefly contends an evidentiary hearing was necessary. Br. of Appellant at 34. ESD is wrong. Washington courts may enforce settlements in summary proceedings. *Brinkerhoff*, 99 Wn. App. at 696-97. A hearing is only required if there are disputed issues. The *Condon* court determined, for example, that an evidentiary hearing was unnecessary. *Id.* at 161-65.

ESD's contention that a full evidentiary hearing is necessary appears to be a "place saver" argument.[34] ESD cannot point to a *single item of evidence* that it did not produce at the February 15, 2013 trial court hearing that it would have produced at a later "evidentiary hearing." It is important to note that this was not the first opportunity for ESD to produce evidence. The Carriers had already moved to enforce the settlement before ALJ Gay. ESD was aware of the Carriers' arguments and had *two chances* to adduce evidence on its position. The trial court here carefully assessed all the evidence produced by the parties in entering its findings of facts.

[34] Indeed, ESD's practice in motions before this Court is to make skeletal arguments in its opening pleadings and then to submit voluminous new arguments on reply, forcing the Carriers to file motions to strike new materials raised on reply. The Carriers fully expect ESD to provide actual support for its position on reply when the Carriers cannot answer. This Court should reject such tactics. *Sacco v. Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) ("This court does not consider issues raised for the first time in a reply brief.").

The trial court had the benefit of an *extensive* record on which it could properly draw its conclusions. It had the benefit of the emails and other communications of the lawyers who negotiated the settlement. An evidentiary hearing was unnecessary.

In sum, ESD's various procedural arguments are baseless.

(3) The Settlement Was Enforceable

ESD contends in its brief at 23-33 that the trial court erred in enforcing the parties' settlement. It pays scant attention to the terms of the very offer it made that were accepted by the Carriers. Instead, it now argues that its actual offer was only an "early" email, br. of resp'ts at 23, and, unbelievably, that its own offer was actually illusory. *Id.* at 24 ("the September 26 email was too incomplete and indefinite to constitute a firm offer ..."). This Court should not condone ESD's after-the-fact manipulation of the record. The trial court carefully assessed the material terms of the settlement, as reflected in ESD's offer and the Carriers' acceptance, and correctly determined a settlement existed. RP (2/15/13):31-53.

The parties here agree that settlement agreements are contracts and are therefore governed by general principles of contract law. Br. of Resp'ts at 23. But the interpretation of settlement agreements must also be undertaken against the background of a strong public policy in

Washington of *encouraging settlements*.[35] Even if the negotiations are oral, courts will enforce settlements. *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383, *review denied*, 100 Wn.2d 1015 (1983).

In discussing contract principles in its brief, however, ESD misstates Washington law on contracts. In general terms, an enforceable contract requires a meeting of the minds on the essential contractual elements. *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 125-26, 881 P.2d 1035 (1994). Contrary to the assertion in ESD's brief at 25, Washington law does not require that an acceptance "mirror" an offer. *Condon*, 177 Wn.2d at 163-65.

Whether there is a meeting of the minds is determined by the objective manifestations of the parties. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Under this approach, the Court must determine the parties' intent by focusing on the objective provisions of the agreement rather than on the unexpressed

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[35] *See, e.g., City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997) ("[T]he express public policy of this state ... strongly encourages settlement."); *Seafirst Cir. Ltd. P'ship v. Erickson*, 127 Wn.2d 355, 365, 898 P.2d 299 (1995) (referring to "Washington's strong public policy of encouraging settlements"). Washington courts have rejected any interpretation of the law that discourages the settlement of disputes. *Blume*, 134 Wn.2d at 258 (declining to apply the independent business judgment rule because it would discourage settlements). As a consequence, Washington courts have aggressively upheld settlements under CR 2A and RCW 2.44.010. *See* Appendix. ESD neglects to address the public policy of encouraging settlements. This Court should uphold Washington's public policy and enforce the agreement reached here under CR 2A and RCW 2.44.010.

subjective intent of the parties. *Id.* Washington contract law does allow introduction of context evidence to provide the historic "backdrop" to the written agreement. *Hearst*, 154 Wn.2d at 502-03. Here, since ESD's initial audits and the subsequent issuance of the notices of assessment to the Carriers, it has been imperative both for these Carriers and the trucking industry generally to obtain a judicial resolution of the legal issues associated with ESD's effort to apply unemployment compensation taxes to owner/operators. Owner/operators are vital to the industry. CP 34. The Carriers and the industry needed to know that owner/operators would not be treated as Carrier employees. The Carriers could not seek a resolution of these legal issues by declaratory action. RCW 50.32.180. They were compelled to endure the administrative process. But the Carriers' goal throughout that ordeal has always been a judicial resolution of those legal issues; this was recognized in AAG Worthy's September 26 email.

Our Supreme Court has recently re-enforced the treatment of settlement agreements as contracts, strictly interpreting material terms of an agreement. In *Condon*, the parties, mother and daughter, were involved in an auto accident in which the daughter was ejected from the car operated by the mother. The mother was covered by Farmers Insurance and the daughter sought recovery under the mother's

uninsured/underinsured motorist coverage. In arbitration, the arbitrator found coverage for the daughter. The daughter later sued the mother and the parties settled and the case was dismissed. Prior to that dismissal, the mother's appointed defense counsel insisted upon a release of all claims by the daughter. The daughter resisted that demand. The mother moved to enforce the settlement agreement. The trial court ordered the daughter to sign the release. The Supreme Court reversed.

The Court held that the trial court had jurisdiction post-dismissal to hear a motion to enforce the settlement agreement. 177 Wn.2d at 161.[36] Moreover, in applying traditional contract principles to settlements, the Court declined to revise a clear settlement agreement or impose obligations on the parties that they did not assume for themselves. *Id.* at 163 ("We cannot read the release proposed by Fely into this otherwise valid settlement agreement when there is no evidence that the parties intended such terms."). Thus, because the parties never made a release a material term of the settlement, the trial court erred by implying a release into their settlement. *Id.* at 163-65.

ESD here is seeking exactly the same relief from this Court that our Supreme Court *rejected* in *Condon*. It is attempting to imply the

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[36] This holding also effectively defeats ESD's claim here that the trial court could not address settlement on a show cause proceeding.

requirement of a formal written settlement agreement as a material term of the parties' settlement when that was *never* a part of the parties' agreement. This Court should reject ESD's argument for the reasons articulated by the *Condon* court.

ESD's specific contentions to defeat a settlement are that its own September 26 offer was an indefinite agreement to agree and that it never intended to be bound. Such an argument is yet another example of ESD's frivolous conduct. It is saying, in effect, that it made an illusory offer to the Carriers that it never intended to be enforceable.

This was not an agreement to agree as described in *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004), *cert. denied,* 544 U.S. 905 (2005). Br. of Resp'ts at 24. ESD has never made such an assertion in this litigation to date, RAP 2.5(a), and to argue that it will somehow be trapped into surprise contractual obligations *when it made the offer* is an argument of desperation. ESD's September 26 offer was unequivocal, as the trial court noted.

Moreover, on the material terms referenced in Worthy's September 26 email, the parties were in complete agreement on the following:

- ESD waived penalties and interest;
- The Carriers stipulated to liability for taxes due;

- ESD and the Carriers agreed on the taxes due as described in Worthy's email;
- The Carriers would pay the taxes due;
- ESD and the Carriers were to bear their own fees and costs in the administrative process.

The *sole* issue of ultimate disagreement was the scope of the legal issues on which the Carriers could seek judicial review. ESD tried to renege on the September 26 statement that the Carriers could pursue "whatever legal issues they want in superior court." All ESD's quibbling in its brief at 25-28 aside, this is the essence of the issue.

Further, ESD argues that CR 2A and RCW 2.44.010 "require a stipulation in open court on the record, or a writing acknowledged by the party to be bound before a settlement is possible." Br. of Resp'ts at 27-28.[37] ESD seems to contend that a formal written settlement agreement is necessary before a settlement is enforceable.

But ESD is wrong in offering such a narrow basis for settlements. It has long been the rule in Washington that writings exchanged by the parties bind them to a settlement, even though they intend to subsequently sign a formal written agreement. Specifically in the settlement context, a formal written agreement of the parties is unnecessary where a contract

[37] ESD's offer in this case was in writing and subscribed to by ESD's counsel, thus complying with CR 2A and RCW 2.44.010. It was rendered binding by the Carriers' written acceptance.

has been formed orally or by exchanges of writings, *unless the parties expressly condition the settlement on such a formal writing*. *Stottlemyre*, 35 Wn. App. at 171-72. *Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357, *review denied,* 122 Wn.2d 1020 (1993). *See also, Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 149 P.3d 691 (2006) (noting an exchange of correspondence can constitute a binding contract). As Division III stated in *Stottlemyre*: "If the intention of the parties is plain and the terms of the contract are agreed upon, then a contract exists, even though one or both of the parties may have contemplated later execution of a writing." 35 Wn. App. at 171.

Perhaps the best illustration of the applicable rule is *Morris*, where the Court of Appeals held that two letters exchanged by the parties' counsel were sufficient to establish a binding settlement agreement even though the parties contemplated a more formal written agreement. 69 Wn. App. at 872. This was true even though the parties themselves had not signed the letters because they agreed upon the subject matter, the material terms were stated in their letters, and the evidence showed their intent to be bound. *Id.* at 869, 872. The Court recognized that even though the parties were working out the final terms of the settlement agreement, it did not necessarily mean that they did not intend to be bound. *Id.* The Court

held that the attorneys' letters complied with the requirements of CR 2A and RCW 2.44.010 and enforced the agreement.

Thus, contrary to ESD's contention, courts can readily enforce settlements where the parties have exchanged letters or emails. The format of the parties' offer and acceptance is not itself, in any way disabling to the existence of a settlement.

The key issue is whether an offer and acceptance have occurred. In determining whether writings are sufficient to establish a contract, the Court must consider whether: (1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. *Morris*, 69 Wn. App. at 869, 872 (citing *Loewi v. Long*, 76 Wash. 480, 484, 136 P. 673 (1913)). As in *Morris*, all three elements are satisfied here. First, the agreement is set forth in writings exchanged by the parties and signed by ESD, the party to be bound. CP 77-83. Second, the parties agreed to the material terms of the agreement. Specifically, *ESD made the proposal that the Carriers accepted.* If ESD thought other terms were material, it obviously should have included them in its September 26th proposal. It did not. The parties agreed to the final amount of each revised assessment, exclusive of penalties and interest, the Carriers' payment of the revised assessments,

the Carriers' right to appeal, and each party's responsibility for its own attorney fees and costs. *Id.* While drafts of the more formal written agreement generated after the Carriers' October 8, 2012 acceptance letter are more detailed, the subsequent refinements did not materially alter the material terms of the underlying agreement.[38]

Rather than address the *material* terms of the agreement, ESD focuses on exchanges between the parties in November 2012 relating to such extraneous issues as whether to refer to certain individuals in the final written agreement as "employees," "owner/operators," or "drivers." *See* CP 147. ESD's argument completely misses the point that the Carriers accepted *the material terms of ESD's offer* in October 2012. Once an offer is accepted, a contract is formed unless the acceptance changes the terms of the offer in "material respect." *Sea-Van*, 125 Wn.2d at 126.

ESD contends that even though it *never made a final, agreed-to written agreement a condition of settlement in the material terms that it crafted*,[39] a court should have divined that this was what it intended, a

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[38] ESD's attempt to renege on its own September 26 proposal does not render the agreement "disputed." *Lavigne v. Green*, 106 Wn. App. 12, 19, 23 P.3d 515 (2001).

[39] ESD's selected quotes from the agreement drafts do not express any such intent. Br. of Appellant at 31. One is a standard modification clause, requiring future modifications to be in writing. Another sets forth the operative date of the settlement. Another is nothing more than an acknowledgment of the agreement's terms. *Nothing* in these provisions manifested the parties' intent to retroactively make the offer and acceptance contingent on the final written agreement. The emails and letters attached to

position expressly rejected by our Supreme Court in *Condon*. Thus, ESD's citation of a dissolution case in which the parties expressly exchanged draft agreements,[40] and a New York district court decision[41] do not help it.

In this case, the parties and their attorneys utilized modern technology through an exchange of emails and written correspondence to come to an agreement. That evidence confirms that ESD made an offer to the Carriers to resolve their cases, that the Carriers accepted the offer, and that the parties intended to be bound by that offer. ESD wants to distract this Court from this fact by highlighting the parties' after-the-fact quibbling over non-material details. This does not avoid the parties' agreement on *the material terms*. Given Washington's long-standing policy favoring settlement and given the fact that ESD itself determined

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Thomas Fitzpatrick's declaration document the parties' intent to be bound even though they had not settled on the final form of the formal agreement. CP 46-47, 77-86.

[40] ESD cited *In re Marriage of Langham and Kolde*, 153 Wn.2d 553, 562, 106 P.3d 212 (2005) as controlling. Br. of Appellant at 29. But *Langham* is easily distinguished. The key difference between *Morris* and *Langham* is that in *Langham*, the alleged offeror submitted the offer as an unsigned written stipulation. Logic dictates that when a party conveys an offer in contract form, it intends the contract to be binding when the parties sign it. In contrast, here, as in *Morris,* ESD made an offer in correspondence, and the Carriers accepted it in responsive correspondence -- without any indication by either party that either the offer or the acceptance was contingent on a final written contract.

[41] *Zucker v. Katz*, 836 F. Supp. 137 (S.D.N.Y. 1993), cited by ESD, actually supports the Carriers' position. While New York law on settlement is different than Washington's, the core question is whether a party *expressly* states that it does not intend to be bound by a settlement until it is reduced to writing. *Id.* at 144. ESD never stated this in its offer or anywhere else.

the material terms of the settlement in its September 26 email, accepted by the Carriers, the trial court properly enforced the parties' resolution of the assessment amounts pursuant to CR 2A and RCW 2.44.010. The Court should hold ESD to the terms of a settlement it proposed.

(4) ESD's Conduct in Reneging on the Agreement Was in Bad Faith

ESD's resistance to the agreement it made to resolve the cases in the administrative process was in bad faith. The trial court erred by not sanctioning ESD.

The trial court's order is silent on why it declined to sanction ESD. CP 432. ESD's decision to renege on its own settlement proposal is but another example of ESD's chronic misconduct in this case, richly justifying a determination that ESD acted in bad faith and warranting an award of attorney fees and costs to the Carriers.[42]

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[42] The administrative appeals lagged because of ESD's faulty audits and its continued inability to describe precisely how it arrived at the assessed amounts. ESD continues to blame the Carriers for its delays, asserting, without any foundation in the record, that the Carriers failed to supply it with necessary information to prepare the new assessments after ALJ Gay's April 5, 2011 remand order. Reply on Mot. to Stay at 2 n.1; Reply on Mot. to Modify at 7-8 n.5.

The record here is clearly to the contrary:

- In *April 2011,* the ALJ ordered ESD to revise System's assessment to exclude owner/operators who either were incorporated or did not work in Washington. CP 332-33;

- When ESD revised its assessment a year later, *in April 2012,* it did not remove a single owner/operator on the basis of corporate form or situs outside Washington. CP 334-35;

Washington law has long recognized that attorney fees should be awarded against a party engaging in bad faith conduct as an equitable exception the American Rule on attorney fees. *See, e.g., Miotke v. City of Spokane*, 101 Wn.2d 307, 338, 678 P.2d 803 (1984); *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998); *In re Recall of Lindquist,* 172 Wn.2d 120, 258 P.3d 9 (2011). *See also, Dempere v. Nelson*, 76 Wn. App. 403, 407, 886 P.2d 219 (1994), *abrogated on other grounds by Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997); *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927, 982 P.2d 131 (1999), *review denied,* 140 Wn.2d 1010 (2000) (identifying the three types of bad faith conduct warranting

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- On February 6, 2013, ESD submitted a list of incorporated owner/operators, but did not revise its assessment to reflect any corresponding deductions. CP 334-35; and
- On the same day, ESD *admitted* that it had not excluded any out-of-state owner/operators. CP 328.

Nearly two years were wasted in this case trying to make sense of ESD's assessments. This process has been complicated by ESD's refusal to comply with the ALJ's remand order. For example, the ALJ specifically ordered ESD to issue amended audit findings and revised assessments that could be relied upon at hearing. But ESD did not do so. Although it issued "re-determined" assessments, it now *admits* that it never performed official "revised assessments" that can be relied upon at hearing. CP 130. The remand order also required ESD to address the situs of service for owner/operators who leased equipment to System. But ESD *admits* that it did not perform that adjustment before issuing System's revised assessment and *admits* that System's assessment *still* contained errors. CP 134-36.

the imposition of attorney fees). ESD has engaged in procedural bad faith here by dragging out these cases for *nearly three years* and by attempting to repudiate the very agreement that it proposed and that the Carriers accepted.

Washington law parallels a rich body of federal case law emphasizing the courts' inherent power to sanction bad faith conduct. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 50, 111 S. Ct. 2123, 115 L.Ed.2d 27 (1991) (a court's inherent power to assess attorney fees as a sanction extends to a full range of litigation abuses, including bad faith conduct that delays or disrupts the litigation). *See also, Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 44 L.Ed.2d 141 (1975) (a court's inherent authority extends to assessment of attorney fees as part of a fine levied for willfully disobeying a court order or for acting in bad faith, vexatiously, wantonly, or for oppressive reasons).

A court's inherent authority to protect the integrity of the judicial process has justified fee awards when an individual attempts to disrupt the settlement of litigation. In *In re Itel Securities Litigation*, 596 F. Supp. 226 (D.C. Cal. 1984), *cert. denied,* 791 F.2d 672 (1986), the parties agreed to settle. An attorney involved on the periphery of the case had entered the securities litigation for the apparent purpose of obtaining fees for work

he performed in another dispute. He believed that he could exert some leverage over Itel by threatening the negotiations for settlement of the securities litigation. He filed motions and an objection to the proposed settlement in the securities litigation. The court specifically found that the attorney's conduct constituted bad faith, and awarded attorney fees and costs under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 for expenses the plaintiffs incurred in responding to the attorney's misconduct. 596 F. Supp. at 234. *See also, Lawson v. Brown's Home Day Care Center, Inc.*, 861 A.2d 1048, 1053 (Vt. 2004) (reiterating the court's holding from an earlier remand order in the same case that negotiating in bad faith during settlement negotiations can result in sanctions against the attorney).

In *Ullmann v. Olwine, Connelly, Chase, O'Donnell & Weyher,* 123 F.R.D. 559, 562 (S.D. Ohio 1987), *aff'd*, 857 F.2d 1475 (6th Cir. 1988), the parties settled a sexual harassment case at trial. Thereafter, defense counsel drafted documents to implement the settlement and forwarded them to plaintiff Ullmann's counsel, who approved them and forwarded them to his client. Ullmann, an attorney, refused to sign the documents on the basis of duress, forcing the law firm to choose between reopening the case and moving to enforce the settlement. The law firm successfully moved to enforce the settlement. It then filed a motion seeking to recoup the fees and expenses that it expended on the motion to enforce.

Determining that Ullmann's conduct in refusing to execute the settlement was without merit, the district court considered whether, in attempting to upset the settlement, Ullmann "multiplie[d] the proceedings in [the]case unreasonably and vexatiously" under 28 U.S.C. § 1927. As the court observed: "[a]greements settling litigation are solemn undertakings, invoking a duty upon the involved lawyers, as officers of the Court, to make every reasonable effort to see that the agreed terms are fully and timely carried out." 123 F.R.D. at 561 (citations omitted). Considering that Ullmann was a lawyer and that she admitted she agreed to the settlement, the court held that the law firm was entitled to sanctions. "it would make a mockery of the law to permit such a person to 'sandbag' a court and opposing counsel into discontinuing a trial by pretending to a voluntary settlement without reservation and then reneging on it later. Attorneys are required to be made of sterner stuff and to keep their word when it is given. Ullmann's repudiation of the settlement based on her claim of duress is unreasonable and vexatious." *Id.* at 562.

The trial court should have imposed sanctions against ESD for its bad faith conduct here.

(5) ESD's Appeal Is Frivolous and Taken for Purposes of Delay

The Rules of Appellate Procedure provide for sanctions in response to improper conduct on appeal analogous to violations of CR 11 in the trial courts. RAP 18.7; RAP 18.9(a). Washington appellate courts have awarded fees on appeal to parties who have abused the appellate rules or filed frivolous appeals. Philip Talmadge, *Toward a Reduction of Washington Appellate Court Caseload and More Effective Use of Appellate Court Resources*, 21 Gonzaga L. Rev. 21, 34-37 (1985/86).

The test for a frivolous appeal was set in *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, *review denied,* 94 Wn.2d 1014 (1980):

> (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

See also, Millers Casualty Ins. Co. v. Briggs, 100 Wn.2d 9, 15, 665 P.2d 887 (1983) (adopting *Streater* test); *Boyles v. Dep't of Retirement Sys.*, 105 Wn.2d 499, 507-08, 716 P.2d 869 (1986) (imposing sanctions against DRS for continuing to challenge Boyles' disability pension entitlement in the hope of delaying payment or enforcing Boyles to abandon his effort to secure his pension); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 732 P.2d 510

(1987) (imposing sanctions against DSHS in case relating to rules reducing benefits to public assistance recipients).

An appeal may be frivolous if it is essentially factual, rather than legal, in nature, involves discretionary rulings where discretion was not abused by the trial court, or an appellant cannot cite any authority in support of its position. All of such arguments would offer no reasonable possibility of reversal.

Moreover, where a party uses the rules to delay or for an improper purpose, sanctions are appropriate. *Boyles*, *supra* (state agency refused to abide by earlier Supreme Court decision, delaying disability payment to Boyles, and seeking to have him abandon his effort to secure disability payment); *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 223, 829 P.2d 1099 (1992) (party filed motion on appeal to disqualify opposing counsel); *Layne v. Hyde*, 54 Wn. App. 125, 773 P.2d 83, *review denied,* 113 Wn.2d 1016 (1989); *State ex rel. Quick-Ruben v. Verharen,* 136 Wn.2d 888, 905, 969 P.2d 64 (1998) (disgruntled election opponent of judge filed baseless private quo warranto action to unseat judge). An appellate court may also impose sanctions for a party's recalcitrance or obstructionism. *In re Adoption of B.T.*, 150 Wn.2d 409, 78 P.3d 634 (2003).

Here, ESD's appeal is frivolous, interposed solely to obtain delay in the judicial review of its assessments against the Carriers. This is but a

part of ESD's overall strategy of delay. Not only is ESD's appeal groundless on the merits, its true intent of delay was manifested in its motions practice in the trial court and before this Court in which it has aggressively sought to avoid judicial review of its assessments and to divert the Carriers from having time to respond on the principal issues in the case on appeal.[43] *See Starczewski v. Rich*, 29 Wn. App. 244, 628 P.2d 831, *review denied*, 96 Wn.2d 1002 (1981)) (court imposed sanctions against a party for improper motions that placed unjustified financial and other burden on opposing party). Simply put, ESD's objective to make the cost of defending themselves so great that the Carriers might then go away. ESD's conduct is unacceptable.

ESD's appeal is frivolous and sanctions should be levied against it by this Court.

F. CONCLUSION

Notwithstanding ESD's baseless procedural objections, the parties' written correspondence is sufficient to establish a binding agreement

[43] On top of the nearly *three years* the assessments have languished in the administrative process, ESD filed a stay motion that would have prevented judicial review of its flawed assessments for a period of roughly 15-18 months, the normal duration of review in this Court. It possibly would petition the Supreme Court for review, exacerbating the delay and the prejudice to the Carriers. When Commissioner Schmidt denied a stay, it filed a motion to modify and a motion for accelerated disposition as well as a stay motion in the Spokane County Superior Court. ESD obviously fears judicial review of its flawed assessments, but this Court should not condone its foot-dragging.

between the parties under CR 2A and RCW 2.44.010 even though they contemplated a more formal written agreement. ESD made an offer that the Carriers accepted. The material terms of the resolution were clear and the parties intended to be bound. The Carriers wanted a resolution of the amount of any assessments so that they could go to court on legal issues vital to the trucking industry. ESD itself recognized this fact in its September 26 offer, but later reneged on the scope of judicial review, hoping to dictate to the Carriers which issues they could appeal to court. Nevertheless, all of the requirements for the enforcement of the agreement were met and the trial court properly enforced the agreement.

This Court should affirm the trial court order, and require ESD to pay sanctions for its bad faith conduct at trial and its frivolous appeal.

DATED this 27th day of June, 2013.

Respectfully submitted,

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APPENDIX

CR 2A provides:

> No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

RCW 2.28.150:

> When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

RCW 2.44.010 states:

> An attorney and counselor has authority:
>
> (1) To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him, or signed by the party against whom the same is alleged, or his attorney.

DECLARATION OF SERVICE

On said day below I emailed a true and accurate copy of the Brief of Respondents/Cross-Appellants in Court of Appeals Cause No. 44635-9-II to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 27, 2013 at Tukwila, Washington.

Paula Chapler
Talmadge/Fitzpatrick

TALMADGE FITZPATRICK LAW

June 27, 2013 - 1:28 PM

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